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No. 79-1009

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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**HARRY ALEMAN and LEONARD FORESTA,**

*Petitioners,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

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## PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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DONALD R. HARRIS
CAROL R. THIGPEN
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
*Attorneys for*
HARRY ALEMAN

JULIUS LUCIUS ECHELES
35 East Wacker Drive
Room 3500
Chicago, IL 60601
*Attorney for*
LEONARD FORESTA

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60616 (312) 525-6581

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### I.

### THIS COURT SHOULD RESOLVE THE IMPORTANT RICO ISSUES PRESENTED BY THIS CASE

(Reply to Pages 5-6 of Brief for the United States in Opposition to Writ of Certiorari)

The Government's view of the *Sutton* case places form over substance in relying upon the rule which vacates an opinion when rehearing *en banc* is granted. In view of the

fact that strong and well-reasoned dissenting opinions have been filed in three of the five circuits which have adopted the Government's view of RICO (see our Petition, pp. 14-15), the obvious fact that a division will exist among the judges in the Sixth Circuit regardless of the outcome in *Sutton,* and the Government's concession that it would recommend that certiorari be granted "on this important question" if the original opinion in *Sutton* survives rehearing (see Government's Supplemental Memorandum in *Little* v. *United States,* No. 79-5013), certiorari should be granted regardless of the outcome of the *en banc* rehearing in *Sutton.*

The Government has failed to respond to the important points raised in petitioners' brief on the RICO issue. The Government's brief in opposition does not deal with the fact that the Seventh Circuit majority opinion renders Section 1962 meaningless by prohibiting persons associated with a robbery "enterprise" from conducting the robbery "enterprise's" affairs through a pattern of committing robberies. (See Petition, p. 9.)* The Government's position ignores the substantial legislative history concerning Congressional intent and avoids any kind of analysis of the manner in which RICO was applied in the instant case. This Court should now address the important and far-reaching questions raised by the majority's construction of RICO in this case.

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* The Government's factual recitation misstates (p. 4) that Foresta and Aleman threatened the occupants at the Oak Lawn robbery. The Government's evidence was that the Oak Lawn robbery was committed by Foresta and the Government's witness, Louis Almeida, and Aleman was not alleged to have been present. (See 609 F.2d at 301-02.)



## II.

## SEPARATE SENTENCES FOR THE SECTION 1962 OFFENSES AND FOR THE UNDERLYING ACTS OF RACKETEERING VIOLATE THE DUE PROCESS AND DOUBLE JEOPARDY CLAUSES

(Reply to Pages 6-8 of Brief for the United States in Opposition to Writ of Certiorari)

The Government submits that separate sentences for the stolen property count and for the RICO counts do not violate the double jeopardy clause because the stolen property count did not have to be proved in order to establish the existence of the enterprise. The Government reasons that only two acts of racketeering activity are necessary for conviction and the evidence at trial showed three other acts of racketeering—the three robberies. However, it is impossible to determine what the jury based its decision on in convicting Mr. Aleman and Mr. Foresta of the racketeering counts. Mr. Aleman was alleged to have been present at only one of the three robberies charged, and even in that robbery, he was not identified by anyone. Thus, it is easily possible that the jury considered the stolen property count as one of the two acts of racketeering activity required for conviction under RICO.

This case is similar to cases in which courts have held that a failure of proof with respect to one element of a conspiracy requires reversal of the conspiracy count where it is not possible to determine the basis for the jury's guilty verdict. *E.g.,* in *United States* v. *Tarnopol,* 561 F.2d 466, 475 (3d Cir. 1977), the Court stated:

> "It follows that there was a failure of proof with respect to this particular alleged objective of the conspiracy. Accordingly, since we cannot know whether or not the jury based its verdict upon this objective alone, the verdict of guilty on Count I cannot stand."

Accord *United States* v. *Carmine,* 577 F.2d 556, 567 (9th Cir. 1978). *Compare United States* v. *Donner,* 497 F.2d 184, 190-91 (7th Cir. 1974), *cert. denied,* 419 U.S. 1047 *with United States* v. *Baranski,* 484 F.2d 556, 561 (7th Cir. 1973).

If the stolen property count was one of two acts on which the jury based its RICO verdict, then multiple punishments for this offense violate the Double Jeopardy Clause. Petitioners request that this Court reserve its decision on this point until it has decided *Whalen* v. *United States,* No. 78-5471 (argued November 27 and 28, 1979), in which a similar issue is raised.

## III.

## THIS COURT ERRED IN REFUSING TO SEVER COUNTS CHARGING FORESTA WITH TRANSPORTING AND POSSESSING A FIREARM AS A CONVICTED FELON

(Reply to Pages 6-8 of Brief for the United States in Opposition to Writ of Certiorari)

The Government contends that there was no abuse of discretion by the trial judge in trying the firearm offenses with the RICO counts and that petitioners have demonstrated no prejudice from the denial of severance. It further argues that the point relating to petitioners' offer to stipulate to the fact of a prior conviction after denial of the severance motion was not raised in the Court of Appeals and in any event, "as a general rule" the government is not required to accept an offer to stipulate.

In *United States* v. *Busic,* 587 F.2d 577, 585 (3d Cir. 1978), *cert. granted on other issues,* Nos. 78-6020, 78-6029 (June 4, 1979), the Court stated in dictum that in ruling on a pretrial motion to sever the district court should determine whether evidence of a prior conviction would be independently admissible on the other counts. If it is determined that the convictions would not be admissible, the *Busic* Court stated that the severance should be granted. The *Busic* Court held that the refusal to sever was harmless error, since the defendants raised the defense of entrapment and the evidence of their prior convictions was therefore admissible under Rule 404(b) of the Federal Rules of Evidence to rebut that defense. The *Busic* case is in direct conflict with the Seventh Circuit's opinion in the present case on this issue. The conflict should be resolved by this Court.



The Government's claim that Foresta did not raise the stipulation argument in the Court of Appeals is erroneous. In their argument to the Court of Appeals that the trial judge erred in admitting evidence of the conviction, petitioners stated:

> "After the motion to sever Counts VIII and IX were denied, defendants offered to stipulate to the fact that Mr. Foresta had been found guilty of a felony, and requested that the jury not be told that robbery was the specific charge. (Tr. 1294.)" (Petitioners' Brief in the Court of Appeals, pages 60-61.)

Petitioners then set forth in their brief the reasons why such evidence was inadmissible. The fact that the Seventh Circuit chose not to comment on this point raised in petitioner's brief does not foreclose petitioners from raising it again in their petition for certiorari. Although it may be true "as a general rule" that the government is not required to accept an offer of stipulation, the government and the trial judge had the obligation to protect petitioners' fundamental right to a fair trial, which required exclusion of the evidence of a prior robbery conviction of one of the defendants.

## CONCLUSION

For the reasons stated above and for the reasons set forth in their Petition for Writ of Certiorari, petitioners respectfully request that this Court grant a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

DONALD R. HARRIS
CAROL R. THIGPEN
*Attorneys for Harry Aleman*

JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611

JULUIS LUCIUS ECHELES
*Attorney for Leonard Foresta*

35 East Wacker Drive
Room 3500
Chicago, IL 60601